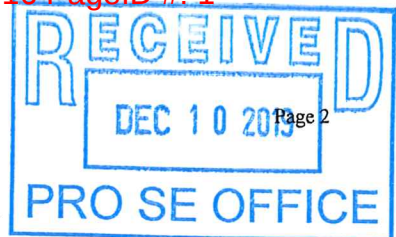


FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
AO 241
(Rev. 06/13) ★ DEC 10 2019 ★

ORIGINAL



PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY
LONG ISLAND OFFICE

United States District Court		District: EASTERN	
Name (under which you were convicted): TROY TOTESAU		Docket or Case No.: CV-19 6992	
Place of Confinement: Eastern NY Correctional Fac. P.O. BOX 338, Napanoch, New York 12458		Prisoner No.: 11-A-1106	
Petitioner (include the name under which you were convicted): TROY TOTESAU		Respondent (authorized person having custody of petitioner): William Lee CHEN, J.	
The Attorney General of the State of:		New YORK	

RECEIVED

PETITION

DEC 13 2019

EDNY PRO SE OFFICE

- (a) Name and location of court that entered the judgment of conviction you are challenging:
Supreme Court of the State of New York,
County of Nassau
- (b) Criminal docket or case number (if you know): Indictment No. 1916/09
- (a) Date of the judgment of conviction (if you know):
- (b) Date of sentencing: February 7th, 2011
- Length of sentence: Twenty-five years determinate/5 years Post.
- In this case, were you convicted on more than one count or of more than one crime? ☒ Yes ☐ No
- Identify all crimes of which you were convicted and sentenced in this case: Robbery 1st Degree (two counts), Burglary 1st Degree (two counts) Robbery 2nd Degree, Attempted Assault in the Second Degree (five counts) and Unlawful Imprisonment in the Second Degree (five counts). The Court also directed petitioner to pay restitution of \$31,500; as well as mandatory surcharges.
- (a) What was your plea? (Check one)

<input checked="" type="checkbox"/> (1) Not guilty	<input type="checkbox"/> (3) Nolo contendere (no contest)
<input type="checkbox"/> (2) Guilty	<input type="checkbox"/> (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: New York State Appellate Division: Second Department

(b) Docket or case number (if you know): A.D. NO. 2011-02333/Ind. NO. 1916N/09

(c) Result: Affirmed with an opinion.

(d) Date of result (if you know): December 26th, 2013.

(e) Citation to the case (if you know): 112 A.D. 3d 977 (2nd Dept. 2013)

(f) Grounds raised: Improperly elicited DNA evidence, Egregious misconduct of the prosecutor, not afforded the effective assistance of Counsel, Denied his right to the due process of law and to a fair trial, Trial Court impermissibly diluted the prosecutor's burden of proof. Pro-se supplemental brief, illegally imposed resititution, multiplicitous counts of indictment, no probable cause to justify search of defendant and vehicle for traffic violation.

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: New York State Court of Appeals

(2) Docket or case number (if you know): A.D. NO. 2011-02333/Ind. NO. 1916/09

(3) Result: Leave to further appeal was denied without an opinion

(4) Date of result (if you know): August 28th, 2014

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

Same as all the above claims
plus Contradicting factual records by same witnesses,
identification evidence, denied one-witness identification charge
and surprise witnesses.

(h) Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes☒ No

If yes, answer the following:

(1) Docket or case number (if you know): _____

NA

(2) Result: _____

NA

(3) Date of result (if you know): _____

NA

(4) Citation to the case (if you know): _____

NA

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☒ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: New York State Appellate Division: Second Department

(2) Docket or case number (if you know): _____

A.D. NO.: 2011-02333

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

Writ of error coram nobis.

(5) Grounds raised: _____

Ineffective Assistance of Counsel,
sentence was harsh and excessive for first
time offender.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes☒ No

(7) Result: _____

Denied with an opinion

(8) Date of result (if you know): _____

January 27th 2016

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: State of New York: Court of Appeals

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: leave to appeal application

(5) Grounds raised: _____

Same as above claims.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No(7) Result: Denied without opinion(8) Date of result (if you know): June 13th 2016

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

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(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

CPL 440 Motion

Name and location of the court where the motion or petition was filed:

Supreme Court:
Nassau County

Docket or case number (if you know):

Indictment No. 1916N-09

Date of the court's decision:

October 1st, 2012

Result (attach a copy of the court's opinion or order, if available):

See copy.

(3) Did you receive a hearing on your motion or petition?

☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition?

☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

New York State Appellate
Division: Second Department.

Docket or case number (if you know):

Indictment No. 1916-09/-2012-10039

Date of the court's decision:

June 27th 2013

Result (attach a copy of the court's opinion or order, if available):

Leave to Appeal
was Denied.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

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(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

GROUND TWO:Improperly elicited DNA evidence

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

DNA evidence that prosecutor claimed was DNA evidence against Petitioner but which showed not that petitioner matched the DNA of the perpetrator but that petitioner and a half a billion others could not be excluded on the basis of the DNA analysis. Sixth Amendment right to confrontation was violated when analyst testify to the conclusions others.

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: CPL 440 motion to vacate

Name and location of the court where the motion or petition was filed: Supreme Court

Nassau County

Docket or case number (if you know): C-008

Date of the court's decision: February 21, 2017

Result (attach a copy of the court's opinion or order, if available):

DeniedSee copy

(3) Did you receive a hearing on your motion or petition?

☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Received notice of entry of decision 2 years after decision was made, notice dated March 15th 2019. At time received petitioner was in the middle of a motion before the Supreme Court: Nassau County.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two : _____

GROUND THREE:

Unreliable and unduly Suggestive identifications, deprived of a fair trial.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Elicited improper testimony to bolster the identification testimony of the complainants, at alleged co-defendant (Dexter Lucas) trial contradicting factual records by same witnesses. Alleged co-defendant [Dexter Lucas] who went to trial after petitioner was acquitted by a separate jury.

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes

☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes

☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

CPL 440 Motion to Vacate

Name and location of the court where the motion or petition was filed:

Supreme Court:

NASSAU County

Docket or case number (if you know):

Indictment No. 1916N/09

Date of the court's decision:

October, 1st 2012

Result (attach a copy of the court's opinion or order, if available):

Denied

See copy

(3) Did you receive a hearing on your motion or petition?

☐ Yes

☒ No

(4) Did you appeal from the denial of your motion or petition?

☒ Yes

☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☒ Yes

☐ No

(6) If your answer to Question (d)(4) is "Yes," state: New York

Name and location of the court where the appeal was filed:

New York State Appellate

Division: Second Department

Docket or case number (if you know):

Indictment NO 1916N-09/-2012-10039

Date of the court's decision:

June 27th 2013

Result (attach a copy of the court's opinion or order, if available):

Denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: Defense Counsel's failure to advise petitioner about his sentence exposure, or to accept or reject the plea offer.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner was offered a cap of 12 years plea deal. What counsel did not tell defendant was that petitioner was eligible to be sentenced on the charges on indictment to twenty-five years behind bars plus 5 years post-release supervision.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes

☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

Appellate Counsel ineffective assistance.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

CPL 440 motion

Name and location of the court where the motion or petition was filed: Supreme Court:
Nassau County

Docket or case number (if you know): Indictment No. 1916N-09, C-009

Date of the court's decision: Entered and filed June 14th, 2019

Result (attach a copy of the court's opinion or order, if available): Denied
See copy

- (3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No
- (4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No
- (5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No
- (6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: New York State, Appellate
Division: Second Department

Docket or case number (if you know): A.D. No. 2019-09038

Date of the court's decision: October 18th 2019

Result (attach a copy of the court's opinion or order, if available): Denied
See copy

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____
- _____
- _____
- _____
- _____
- _____

13. Please answer these additional questions about the petition you are filing:

- (a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☒ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

- (b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

Daniel Papa, Esq.

(b) At arraignment and plea:

Paul Zsuffa, Esq.

(c) At trial:

Dennis Lemke, Esq.

(d) At sentencing:

Dennis Lemke, Esq.

(e) On appeal:

Marianne Karas, Esq.
980 Broadway-Suite 324, Thornwood, NY 10594

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

Pro-Se

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

December 26th, 2013 Appellate Division: Second Department, affirmed Direct appeal.

August 28th, 2014 New York State Court of Appeal denied Leave to appeal. August 2015 Writ of error coram nobis filed in Appellate Division: Second Department (stopped clock/Time). January 27th, 2016 Appellate Division denied writ of Error coram nobis. April 2016, leave to appeal motion in New York State Court of Appeal.

June 13th, 2016 New York State Court of Appeal denied leave to appeal motion filed. June 10th, 2016 CPL 440 motion was filed in the Supreme Court: Nassau County. Decision dated February 21st, 2017 denied motion. Notice of entry of that decision received March 20th, 2019 dated March 15th, 2019. January 24th, 2019 CPL 440 motion file in Supreme Court: Nassau County.

June 6th, 2019 Supreme Court: Nassau County denied motion. June 14th, 2019 appealed in Appellate Division: Second Department for certificate granting leave to appeal. October 18th, 2019 Appellate Division: Second Department denied leave, Notice of Entry dated October 24th, 2019. Petitioner is left with 70 days to file this petition, under 28 U.S.C. § 2254 for Writ of Habeas Corpus.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

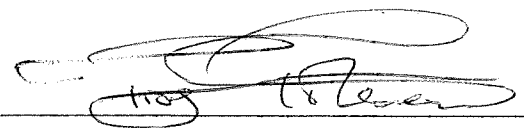
Therefore, petitioner asks that the Court grant the following relief: Granting Petitioner
release for being unlawfully imprisoned for a fair
and new trial.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 11/27/2019 (month, date, year).

Executed (signed) on November 27th (date).



Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

TROY TOTESAU #11A1106
Eastern NY Correctional Facility
P.O. Box 338
Napanoch, New York 12458-0338



EASTERN NY CORRECTIONAL FACILITY
BOX 338
NAPANOCH, NEW YORK 12458-0338
NAME: TROY TOTESAU DIN: 11A1106



United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

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